

IN THE
United States Court
of Appeals
FOR THE NINTH CIRCUIT

WHEELER OSGOOD Co.,	} <i>Petitioner,</i>	No. 12791
vs.		
FEDERAL TRADE COMMISSION,	} <i>Respondent.</i>	No. 12792
NORTHWEST DOOR COMPANY		
vs.	} <i>Petitioner,</i>	No. 12792
FEDERAL TRADE COMMISSION,		
	} <i>Respondent.</i>	

UPON PETITION TO REVIEW AN ORDER OF THE
FEDERAL TRADE COMMISSION

REPLY BRIEF OF THE PETITIONERS

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**MOTION TO STRIKE RESPONDENT'S
BRIEF**

THE WHEELER OSGOOD COMPANY and
NORTHWEST DOOR COMPANY hereby moves this

Court to strike the brief filed on behalf of Respondent FEDERAL TRADE COMMISSION, for the following reasons:

1. Pages 21-25 inclusive of Respondent's brief, and pages 1-a to 8-a inclusive of appendix A of Respondent's brief pertains to matters not a part of the record before this court.

2. Respondent's brief violates that portion of Paragraph 6 of Rule 19 of the rules of this court in that it attempts to have this court consider matters outside the record in this case.

3. Respondent's brief cannot be answered without Appellants discussing matters outside the record, in violation of said Paragraph of Rule 19.

4. That an accusation of "a possible want of good faith" is a challenge to the integrity of counsel representing Appellants and becomes extremely serious when based entirely on statements and papers not a part of the record on appeal and on papers that could not be admitted in evidence.

ARGUMENT IN SUPPORT OF MOTION TO STRIKE

Respondent, on Pages 21-25 inclusive of its brief accuses Appellants of "want of good faith" and also of an attempt to "wriggle out of a settlement" basing its accusa-

tion upon (1) its own correspondence files; (2) a typewritten transcript of proceedings before the trial examiner, and (3) memorandum prepared by its own counsel 1-a to 8-a of appendix A attached to Respondent's brief, none of which papers are a part of the record before this court.

Rule 19 of this court concerns the record of appeal and the matters to be included therein. Paragraph 6 of Rule 19 reads in part as follows:

"If parts of the record shall be so designated by one or both of the parties, or if such parts shall be distinctly designated by stipulation of counsel for the respective parties, the Clerk shall print those parts only, *and the court will consider nothing but those parts of the record and the points so stated.*"

How can Appellant answer the charges made by Respondent without going outside the record, and showing the Court all of the circumstances which surrounded the parties at the time the Appellants filed their Amended Answers, and making the admissions therein which form the basis for the Commission's Order.

If these Appellants should indulge in the same tactics adopted by Respondent, this Court would, in effect, be asked to try an issue which is not material to the decision of the case, and which has not been subjected to the usual rules of Evidence.

Respondent goes outside the record when it argues that Appellants' Amended Answers are a compromise and

therefore Appellants admit their wrongdoing and impliedly confess that their wrongdoing continues because not proven to be discontinued.

A compromise means that both parties have receded from their original position.

Compromises are favored in the law and counsel for Respondent must know that evidence relative to compromise cannot be introduced into a case, neither can the implications of a compromise be argued in good faith.

The Appellants feel that the arguments presented by Respondent in the pages of its brief above referred to, permeate its entire brief and that the court cannot correct Respondents unwarranted action by merely disregarding the particular points referred to therein.

For the reasons hereinabove set out, these Appellants believe that their Motion to Strike Respondent's Brief should be granted.

REPLY TO RESPONDENT'S BRIEF

Without waiving Appellants' Motion, hereinabove made, Appellants desire to call the Court's attention to two points which Respondent has attempted to seriously confuse:

1. Discontinuance of Unlawful Acts as of 8-1-41

Respondent engages in a lengthy argument in an

effort to show that Appellants might be still engaged in the unlawful acts set out in the Complaint. Respondent argues that an unlawful combination once conceded, presumes to continue unless positive evidence to the contrary has been adduced.

Respondent completely ignores the record in indulging in this presumption. Paragraph 7 of the Findings of the Commission state that the activities of the Appellants existed "during a substantial part of the period of time between May 1935 and August 1941 (See Pages 109-110 of the Record). This Finding was based solely upon the Amended Answers of Appellants which admitted some of the acts alleged in the Amended Complaint were committed during the period above referred to and "not otherwise."

This, under the circumstances, can be interpreted to mean only one thing, and that is that the Commission considers that no unlawful act was committed after August 1, 1941. Therefore, presumption of continued violations argued by Respondent is amply denied by the Commission's admission.

It is fair to assume that if the Commission had any evidence that Appellants were engaged in any unlawful acts after August 1, 1941, Respondent would not have rested its case on Answers, which affirmatively stated that no unlawful acts were committed after August 1st, 1941.

2. National Recovery Act.

Respondent has failed to understand Appellants' argu-

ment relative to the National Recovery Act. No contention was made that after the Act was held unconstitutional, that combinations in restraint of trade became legal. Appellants were simply making the point that the acts which the Federal Trade Commission complains were unlawful were the very acts which were forced upon the Appellants by the Code Authority acting under the National Recovery Act.

All of the matters herein referred to are included in the public record so the court may take judicial notice thereof.

The one issue this Court is asked to decide is whether the Federal Trade Commission is justified in filing a Complaint against appellants, seven years after the alleged unlawful acts have been discontinued.

The merits of this case have been ably presented by counsel representing other Appellants so we feel it would be unduly burdening the court for us to repeat what has been better said by others.

We respectfully submit that the Order of the Commission should be reversed and the case dismissed.

Respectfully submitted,

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